LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

OBJECTION AND REPLY TO PETITION AND BRIEF, *AMICI CURIAE*, OF ORDER OF RAILWAY CONDUCTORS PENNSYLVANIA RAILROAD LINES EAST, ETC.

JOHN VANCE HEWITT,
Attorney for Petitioner,
39 Broadway,
New York 6, N. Y.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
THOMAS F. AHRENSFELD,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 60.

THE PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

against

CHARLES E. O'ROURKE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

OBJECTION AND REPLY TO PETITION AND BRIEF, *AMICI CURIAE*, OF ORDER OF RAILWAY CONDUCTORS PENNSYLVANIA RAILROAD LINES EAST, ETC.

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Although couched in language that might indicate that the said petition and brief were submitted pursuant to the authority of the labor movement of the country, they are in fact submitted by three local unions, the employer of one of which, the Hudson & Manhattan Railroad, we are informed does not own or operate car floats or any floating equipment. Two of the three purport to represent locomotive engineers whose duties admittedly do not require them to go on board car floats (*Amici Curiae* Brief,[1]

[1] As a matter of convenience, the "Petition and Brief, Amici Curiae, of Order of Railway Conductors, Pennsylvania Railroad Lines East", etc., is herein referred to as "*amici curiae* brief" and the parties thereto as "*amici curiae*".

pp. 4, 16) and the other, the Order of Railway Conductors, Pennsylvania Railroad Lines East, having lost the representation election held by the National Mediation Board, is no longer the duly certified and accredited representative of the employees, and has not been such a representative since September 16, 1942. Accordingly, the proposed *amici curiae* are not within the Rules of this Court (Rule 27(9)(c)).

Furthermore, they have not complied with the rules of this Court (Rule 27 (9) (a) and (b)). No claim is made that either of the parties to the case were asked to consent to the filing of a brief *amici curiae* promptly after the granting of certiorari. They were not even so requested prior to or upon the argument on the merits. Such a timely request, we would not have opposed. The railroad company filed its petition for a writ of certiorari on May 12, 1952 and this Court granted the writ on October 13, 1952 (344 U. S. 811). The case was argued on the merits on December 8, 1952, and on January 12, 1953, this Court handed down its decision (—— U. S. ——, 73 S. Ct. 302) reversing the decision of the Court of Appeals (194 F. 2d 612; R. 48). On January 23, 1953, the railroad company was served by respondent with a copy of a petition for rehearing and on January 30, 1953, responded thereto. On January 30, 1953, we received in the mail two copies of the *amici curiae* brief. On February 4, 1953, we were asked to consent to the request of the *amici curiae* to intervene. See Rules of the Supreme Court of the United States, Rule 27 (9) (a), (b), (c). Moreover, the petition and brief (pp. 1, 4) show clearly that the proposed *amici curiae* have been keeping in touch with labor decisions. No claim is made that they were not familiar with each step taken in this action. No excuse is given for their delay.

The said brief states categorically that O'Rourke was certainly a railroader and, therefore, not covered by the

Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. § 901, *et seq.*), or, if not, that he was definitely a seaman entitled to sue under the Jones Act (41 Stat. 988, 46 U. S. C. § 688).

The argument that O'Rourke was a seaman and covered by the Jones Act, it is said (p. 13), was first raised in the *amici curiae* brief. The argument necessarily is that O'Rourke was a member of the ship's crew, was thereby excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 903(a)(1)), and was entitled to the benefits of the Jones Act (see *Norton* v. *Warner*, 321 U. S. 565). By no stretch of the imagination can this employee be deemed a member of the vessel's crew. The undisputed fact was the subject of a stipulation. It was agreed that he was not (R. 37, 39). If the *amici curiae* desire to litigate the question as to which railroad employees may fall within the classification of members of a ship's crew, then that will have to be litigated in an action in which that question is at issue. Here it is stipulated that it is not. It thus appears that the one question raised by the said brief which, it is said, was not heretofore argued in this cause was excluded by stipulation, and is wholly without merit.

The question, whether operating car floats and loading or unloading freight cars therefrom while the floats are moored in navigable waters is railroad employment or maritime employment, has been considered at length (our Brief, pp. 7-11, 14-15; Respondent's Brief, pp. 4-10, 12).

In an attempt to avoid the decision of this Court in the *Nogueira* case,[2] the *amici curiae* seem to indicate that, by the 1939 amendment to the Federal Employers' Liability Act, they had caused something to be done to the phrase "boats, wharves, or other equipment"[3] misquoted in the said brief (pp. 4, 5 and 6). It is intimated that there was

[2] *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128.

[3] Sec. 1 of Federal Employers' Liability Act (45 U. S. C. § 51).

some tampering with the said words. Nothing could be farther from the fact. The representations with respect to the 1939 amendment* were made to Congress by the National Brotherhoods and the American Federation of Labor (Senate Judiciary Sub-Committee Hearings, 76th Congress, 1st Session, March 28, 29, 1939). We do not find that the said words were considered or even mentioned during the course of Congressional consideration of the said amendment, except, of course, in setting forth the text of the first paragraph of Section 1 of the Federal Employers' Liability Act (45 U. S. C. § 51). The language of Section 1 of the Act does not contain a single change from the form in which that paragraph was originally enacted, and which was the subject matter of consideration by this Court in its decision in the *Nogueira* case (281 U. S. 128, 133) and in this case (—— U. S. ——; 73 S. Ct. 302, 304), but there was added to that section the amendment quoted and discussed in our main brief (pp. 11 and 12; footnote 4). It was there also pointed out that the employee here involved was directly engaged in interstate commerce and accordingly the amendment did not affect his status (see also our Brief, footnote 5, p. 12), and that the case cited in the *amici curiae* brief, *Zientek* v. *Reading Co.*, 93 F. Supp. 875 (E. D. Pa.), has not been followed. (See *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, and other cases cited, our Brief, p. 12.) The effect of the 1939 amendment was argued in this cause in the District Court (R. 40, 41-43), mentioned in both the majority opinion (R. 48, 51) and dissenting opinion (R. 53) in the Court of Appeals, and considered in this Court (—— U. S. ——, 73 S. Ct. 302, 306, note 6).

With the exception of the argument as to applicability of the Jones Act, which has been shown to be wholly without merit, the said *amici curiae* petition and brief presents

---

* Sec. 1 of Federal Employers' Liability Act (35 Stat. 65, as amended, 53 Stat. 1404; 45 U. S. C. § 51).

no new arguments that had not been heretofore urged,[5] cites no case relevant to the issues not heretofore presented to this Court for its consideration,[6] and asserts no changes of law or fact occurring since the decision herein.

---

[5] The problem of the twilight zone has been heretofore fully argued and treated in the considered judgment of this Court (our Brief, pp. 12-14; —— U. S. ——, 73 S. Ct. 302, 306, note 8).

The question as to the effect of the Safety Appliance Act was likewise discussed in the respondent's brief, pp. 4, 6, 10, 11, 12.

If some of the laborers who preferred the Longshoremen's and Harbor Workers' Compensation Act in 1927 have changed their minds with the changes in the times, as the *amici curiae* state (compare p. 2 of their brief with pp. 3 and 4), and now prefer some other method of protection, their desire should be made known to Congress. It is obviously immaterial in a judicial determination of the coverage of the Act, notwithstanding the number of pages devoted to it (*Amici Curiae* Brief, pp. 2, 3, 4, 5, 7, 16, 17, 18).

[6] The following decisions were cited by the parties to this proceeding and have been before this Court for its consideration: *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128 (*Amici* Brief, pp. 2, 4, our Brief, pp. 8, 9, 11, 12, 14, 15, 16, Respondent's Brief, pp. 5, 7, 10, 12), *Buren* v. *Southern Pacific Co.*, 50 F. 2d 407 (9th Cir.), *cert. denied* 284 U. S. 638 (*Amici* Brief, pp. 4, 15, our Brief, p. 10), *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (*Amici* Brief, p. 2, our Brief, pp. 7, 14, Respondent's Brief, pp. 5, 6, 12), *Davis* v. *Department of Labor*, 317 U. S. 249 (*Amici* Brief, pp. 11, 12, our Brief, pp. 12, 13), *Seas Shipping Co., Inc.* v. *Sieracki*, 328 U. S. 85 (*Amici* Brief, p. 7, Respondent's Brief, pp. 10, 12), *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135 (*Amici* Brief, p. 11, our Brief, p. 13), *Zientek* v. *Redding Co.*, 93 F. Supp. 875 (*Amici* Brief, pp. 4, 16, our Brief, pp. 11, 12), *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874 (cited in *Amici* Brief, p. 12, *sub nom. Moores* Case, 80 N. E. 2d 478, our Brief, pp. 13, 14), *Norton* v. *Warner Co.*, 321 U. S. 565 (*Amici* Brief, pp. 8, 11, 16, Respondent's Brief, pp. 5, 6) and *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251 (*Amici* Brief, pp. 8, 9, Respondent's Brief, pp. 8, 9). *Central Engineering Co.* v. *Bassett*, 42 F. Supp. 750 (S. D. Ill.) (*Amici* Brief, p. 12), held that an employer engineering company engaged in the construction of a dam and lock was not "engaged in maritime work" within the meaning of the Compensation Act. Other decisions cited in the *Amici Curiae* Brief are not relevant to a decision of the issues here involved.

Nevertheless, the said petition and brief demands that this Court overrule the *Nogueira* case and reverse its own recently rendered decision in this action.

It is respectfully submitted that the *amici curiae* application should be denied.

Respectfully submitted,

JOHN VANCE HEWITT,
Attorney for Petitioner.

CONBOY, HEWITT, O'BRIEN & BOARDMAN,
THOMAS F. AHRENFELD,
Of Counsel.